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IN THE

Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT,
and DAVID W. GORDON, Superintendent, EGUSD

Petitioners,

v.

MICHAEL A. NEWDOW,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF THE ARGUMENT

"[W]hen [government] acts it should do so without endorsing a particular religious belief or practice that **all** citizens do not share." *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) (emphasis added).

Every morning in each of Petitioners' public schools, tax-paid teachers lead impressionable children in joint recitations claiming that the United States is "one Nation under God." For those who do not share the majority's religious belief that there exists a God – and who wish to instill non-Monotheistic values in their children – this intrudes into their rights of parenthood. It is also a facial First Amendment violation that contravenes every Establishment Clause principle this Court has enunciated. The constitutional infirmity is heightened by the fact that this religious proclamation is part of a **pledge** of allegiance. Moreover, it occurs in the public education environment, where the Court has struck down government-sponsored religion – however slight – in nine of nine cases.

When, in 1892, the Pledge of Allegiance was first created, it was purely secular, and embraced every citizen, regardless of religious belief. It unified our country for sixty-two years, and served its patriotic purposes perfectly well through two world wars with no sectarian component. Then, in the midst of the McCarthy era, Congress altered the Pledge's message. Passing a law that did nothing but intrude the two purely religious words "under God" into the preexisting prose, those legislators freely admitted that their goal was to endorse Monotheism, while disapproving of Atheism. The result has been as planned: Monotheism has become "established," and the "outsider" status of a disenfranchised religious minority – Atheists – has been perpetuated.

Petitioners and their *amici* contend that the 1954 law was promulgated mainly for "historical" purposes, allegedly

reflecting the founders' religious beliefs. Congress's own words, plus the broadcast of President Eisenhower (explaining that the change was instituted so that "**[f]rom this day forward** ... school children will daily proclaim ... the dedication of our Nation and our people to the Almighty"), demonstrate that Petitioners' claim is false. And even if the 83rd Congress had intended to pay homage to the majority faith at the time of the founding, such a purpose would, itself, be constitutionally prohibited. To single out that one aspect of the Nation's origins, and to extol its virtues within the Pledge of Allegiance, is an endorsement contrary to the Establishment Clause's principles. This is best realized by considering the constitutionally equivalent phrase, "one Nation under Jesus." Every justification given for "God" can be matched by a similar justification for "Jesus." Yet no one would deem that version permissible.

That "under God" in the Pledge violates the Establishment Clause can also be appreciated by applying any of the Court's numerous tests. Here, purely religious dogma is injected into the nation's sole Pledge of Allegiance, with governmental agents leading small children in repeating that dogma every day. This violates religious neutrality, endorses disputed religious claims, was instituted for a religious purpose, has religious effects, turns citizens into "outsiders" on the basis of their religious beliefs, and – especially in the public school environment – is coercive. The Court has never permitted **any** of these infractions in that setting. Here, **all** are in existence.

"Under God" in the Pledge is an example of the majority using the machinery of the state to enforce its preferred religious orthodoxy. The Court has been unyielding in guarding against such conduct in the public schools. Accordingly, a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," violates

the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment.

Although Respondent has always been and remains a devoted father, his standing to bring this case has been challenged. Respondent had "joint legal custody" when the case began, has "joint legal custody" now, and never lost any significant legal custodial rights during the intervening time. If standing is measured by the injury to the plaintiff, and if the Court recognizes that parents who are fully involved in their children's lives and education are injured when their children are inculcated with religious dogma in the public schools, then this parent has standing as much as any. The Ninth Circuit panel reviewed and applied California state law, and unanimously determined that standing exists. This Court has no need to disturb that correct determination.

ARGUMENT

I. INCLUDING "UNDER GOD" IN THE NATION'S PLEDGE OF ALLEGIANCE VIOLATES THE ESTABLISHMENT CLAUSE

A. STATE-SPONSORED RELIGION IN PUBLIC SCHOOLS IS ABSOLUTELY PROHIBITED

Pursuant to California Education Code § 52720 and Elk Grove Unified School District (EGUSD) Policy AR 6115, tax-supported teachers lead students in a patriotic exercise at the beginning of every school day. Petitioners are the school district and its superintendent, who are responsible for implementing AR 6115. Respondent is a parent whose daughter is enrolled in an EGUSD school, who takes no issue with government-sponsored patriotism.

The patriotic exercise chosen by Petitioners is the Pledge of Allegiance, which was created in 1892, devoid of any religious verbiage. Since then, it has been used – primarily in the public schools – to unify our people and to instill

patriotism. In 1954, however, Congress passed its Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249 ("Act of 1954"), which did nothing but inject the two words, "under God," into the Pledge. As a result, Petitioners' morning exercise now incorporates the purely religious notions that (a) there exists a God, and (b) ours is a nation "under" Him. Thus, every school morning in each of Petitioners' classrooms, government agents indoctrinate their public school students – including Respondent's daughter – with sectarian dogma. It is only against this government-sponsored religious indoctrination that an objection has been raised.

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). This is especially true when school officials and teachers interfere with the religious ideals a parent chooses to instill in his child. Accordingly, in every one of the nine previous cases involving government-sponsored religion in the public education arena – often of a degree far less than is occurring here – the Court has ruled the challenged practice invalid.

Engel v. Vitale, 370 U.S. 421 (1962) – a case essentially identical to the one at bar – makes this clear. There the Court ruled that a morning ritual where public school teachers lead "willing students" in reciting religious text is "a practice wholly inconsistent with the Establishment Clause." *Id.* at 424. Here, EGUSD's teachers lead Respondent's child and her "willing" schoolmates in a daily joint recital that says, in effect, "We are one Nation under God." That this religious dogma has been couched within a patriotic pledge in no way mitigates the offense. *Engel*'s Regent's prayer – which stated, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country," *id.* at 422 – would not have been any more permissible had that brief religious avowal – like "under God" – been intruded into the Pledge: "I pledge

allegiance to ... one Nation under God, upon whom we acknowledge our dependence and whose blessings we seek, indivisible, with liberty and justice for all." In fact, wedding God and the Pledge was the New York Regents' intent. Their prayer was adopted so that "'at the commencement of each school day the act of allegiance to the Flag might well be joined with this act of reverence to God.'" *Engel v. Vitale*, 191 N.Y.S.2d 453, 460-461 (N.Y. Sup. Ct. 1959) (citing "The Regents Statement on Moral and Spiritual Training in the Schools, adopted November 30, 1951").

"Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause." *Engel*, 370 U.S. at 430. Additionally, "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Id.* at 431. These notions apply equally to the recitation of "under God" in the Pledge, as does:

> To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment: "[I]t is proper to take alarm at the first experiment on our liberties. . ."

Id. at 436 (quoting Madison's *Memorial and Remonstrance against Religious Assessments*, II Writings of Madison 183, at 185-186). In view of the foregoing, *Engel* controls here.

Attempting to divert attention from these principles, Petitioners and their *amici* claim "under God" was included in the Pledge to reflect the Nation's religious heritage. Yet both the 83rd Congress and President Eisenhower – who, in 1954, joined to intrude that purely religious phrase into what

was previously a secular oath – focused not on the past, but on the future. Furthermore, even if history had been the stated reason for the intrusion, "[t]he pre-eminent purpose" of putting God into the Pledge "is plainly religious in nature. ... [N]o legislative recitation of a supposed secular purpose can blind us to that fact." *Stone v. Graham*, 449 U.S. 39, 41 (1980). In other words, "the state cannot participate in the advancement of religious activities through any guise." *Wallace v. Jaffree*, 472 U.S. 38, 47 (1985). See also *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963) (where "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature" were the alleged purposes of Bible-readings); and *Edwards v. Aguillard*, 482 U.S. 578 (1987) (claiming "creation science" was needed "to protect academic freedom").

The student and government involvement in religion here is far greater than that in many of the practices already ruled unconstitutional. For example, no teacher or student actively participated in posting copies of the Ten Commandments in *Stone*, and the possible prayer activity in *Wallace* – if any – was to be private and silent. The religious teaching in *McCollum v. Board of Education*, 333 U.S. 203 (1948), involved outside teachers, privately selected, appearing only weekly, and children whose participation was parent-desired. The statute overturned in *Epperson v. Arkansas*, 393 U.S. 97 (1968), involved teaching of evolution, and thus exposed students to no religious activity at all. The religious "science" in *Edwards v. Aguillard* entered the classroom only when contrary secular material was taught. The graduation prayers in *Lee v. Weisman*, 505 U.S. 577, 596 (1992), were given by non-governmental guests, occurred only twice per school career, and were not said by students. The prayers in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) took place at football games. Thus, daily teacher-

led class recitations claiming that the United States is "one Nation under God" is a far greater insult to the Establishment Clause than the majority of public school practices already prohibited by this Court.

In short, "constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom," *McCollum*, 333 U.S. at 230 (Brennan, J., concurring), where "the First Amendment has erected a wall between Church and State which must be kept high and impregnable." *McCollum*, 333 U.S. at 212. Similarly, "the State may not adopt ... practices in its public schools ... which 'aid or oppose' any religion. This prohibition is absolute." *Epperson*, 393 U.S. at 106. In summary:

> The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. Furthermore, "the public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools ..." Consequently, the Court has been required often to invalidate statutes that advance religion in public elementary and secondary schools.

Edwards v. Aguillard, 482 U.S. at 583-584 (citations and footnote omitted).

B. "UNDER GOD" IN THE NATION'S PLEDGE VIOLATES EVERY ESTABLISHMENT CLAUSE TEST THIS COURT HAS ENUNCIATED

The Court has set forth a variety of tests to determine if a governmental practice violates the Establishment Clause. Usually, the choice of test is a critical issue in the analysis. Here, however, that matter is of little consequence – every test leads to the same inevitable result.

(1) A claim that God exists – placed in the midst of the nation's sole pledge of allegiance – violates the requirement of neutrality

When government interlarded the Pledge of Allegiance with "under God," it took one side in the quintessential religious question, "Does God exist?" That alone violates the neutrality that has been deemed essential by every member of this Court: *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2003) (Chief Justice Rehnquist ruled that a voucher program accords with the Establishment Clause when it "is entirely neutral with respect to religion."); *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (Justice Thomas wrote, "In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality."); *Agostini v. Felton*, 521 U.S. 203, 231 (1997) (Justice O'Connor approved of "neutral, secular criteria that neither favor nor disfavor religion"); *Rosenberger v. University of Virginia*, 515 U.S. 819, 839 (1995) (Justice Kennedy referenced "the guarantee of neutrality"); *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687, 704 (1994) (Justice Souter wrote that "civil power must be exercised in a manner neutral to religion."); *Employment Div. v. Smith*, 494 U.S. 872, 886 (1990) (Justice Scalia focused on "generally applicable, religion-neutral

laws"); *Wallace*, 472 U.S. at 60 (Justice Stevens explained that "government must pursue a course of complete neutrality toward religion"). Justices Ginsburg and Breyer joined Justice Souter's dissent in *Rosenberger*, 515 U.S. at 879 (noting that it is key for a law to be "truly neutral with respect to religion") and Justice Stevens' majority opinion in *Santa Fe*, 530 U.S. at 304 ("'The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views'" (quoting *Board of Regents v. Southworth*, 529 U.S. 217, 235 (2000)). Phrased alternatively, "under God" confers an "imprimatur of state approval," *Zelman*, 536 U.S. at 650 (citation omitted), on the disputed, purely religious idea that God exists. This is prohibited under the Establishment Clause.

(2) "Under God" endorses the purely religious ideas that (a) there exists a God, and (b) the nation is "under" that purely religious entity

"Under God" fails the endorsement test, which "does preclude government from conveying ... a message that ... a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent ..." *Wallace*, 472 U.S. at 70 (O'Connor, J., concurring). The "particular religious belief" that there exists a God – plus the notion that we are "under" Him – is preferred by the current version of the Pledge. Although Petitioners, themselves, note that the endorsement test seeks to "examine what the government intended to communicate and what was actually conveyed," by looking at "the text, legislative history, and implementation of the statute," *Pet. Br.* at 28, they never perform that examination. The reason for this is obvious; not only Monotheism, but largely Christian Monotheism, was endorsed in 1954.

The idea of infusing the secular Pledge of Allegiance with religious dogma first came from the Knights of Columbus –

"the largest Catholic laymen's organization" – in 1951.[1] The Knights recommended the change to our federal leaders in 1952,[2] the same year Congress requested that the president "set aside and proclaim ... a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals."[3] On April 20, 1953 (two months after the introduction of H. Con. Res. 60 to create a "Prayer Room" in the Capitol "to seek Divine strength and guidance"[4]), the first of more than fifteen bills to place "under God" into the Pledge was proposed.[5] Authored by Michigan's Rep. Louis Charles Rabaut (who was soon to enter into the Congressional Record the outrageous statement that "An atheistic American ... is a contradiction in terms"[6]), the bill gathered its main support on February 7, 1954, when the Rev. George M. Docherty spoke before his congregation at the New York Avenue Presbyterian Church. Thus, the chief catalyst for placing purely religious words into our perfectly functioning secular pledge was a Sunday sermon.[7]

Attending that sermon was President Eisenhower. Three days earlier, the President and other of the nation's leaders publicly joined in attending a prayer breakfast sponsored by the International Council for Christian Leadership.[8] On the afternoon of Rev. Docherty's sermon, the President took part

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[1] *Brief for amicus curiae Knights of Columbus* at 1.
[2] *Id.* at 1-2.
[3] 66 Stat. 64 (1952); 36 U.S.C. § 169h.
[4] *The Prayer Room in the United States Capitol*, Document No. 234, 84th Cong., 1st Sess. (1954); US GPO, Washington: 1956, at 1.
[5] *Big Issue in D.C.: The Oath of Allegiance*. New York Times, May 23, 1954, E-7.
[6] 100 Cong. Rec. 2, 1700 (Feb. 12, 1954) (Statement of Rep. Louis C. Rabaut, sponsor of the House resolution to insert the words "under God" into the previously secular Pledge of Allegiance).
[7] *Id.*
[8] *Eisenhower Joins in a Breakfast Prayer Meeting*. New York Times, February 5, 1954, A-10.

in a radio and television broadcast of the American Legion's "Back to God" program. The program was "an appeal to the people of America and elsewhere to seek Divine guidance in their everyday activities, with regular church attendance, daily family prayer and the religious training of youth."[9] The President stated he was "delighted that our veterans are sponsoring a movement to increase our awareness of God in our daily lives."[10]

Over the next months, the House and Senate worked together on the legislation, with numerous congressmen openly expressing pro-Monotheistic and anti-Atheistic biases. EOR at 45-53 (*Complaint* App. B, providing eight and a half pages of citations). The final bill passed without objection in either house.[11] Preparing to celebrate the religious conversion of the previously secular Pledge as part of an enhanced Flag Day ceremony, Rep. Oliver Bolton of Ohio (a proponent of the change) called the White House regarding a picture taking. He recommended "that a Protestant, a Catholic and a Jew be in the group."[12] At the ceremony itself, *Onward Christian Soldiers* was played.[13] The lyrics to that song are:

> Onward, Christian soldiers, marching as to war,
> With the cross of Jesus going on before.
> Christ, the royal Master, leads against the foe;
> Forward into battle see His banners go!

Congress stated, "The inclusion of God in our pledge therefore would further acknowledge the dependence of our

[9] *Nation Needs Positive Acts of Faith, Eisenhower Says*. New York Times, February 8, 1954, A-1, 11.
[10] "Text of President's Talk on Faith." New York Times, February 8, 1954, A-11.
[11] 100 Cong. Rec. H7757-66 (June 7, 1954); 100 Cong. Rec. S7833-34 (June 8, 1954).
[12] J.A. 32 (¶ 33).
[13] 100 Cong. Rec. 7, 8617-8618 (June 22, 1954) (Statement of Sen. Homer Ferguson).

people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism ..."[14] President Eisenhower noted, "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty."[15]

This "text, legislative history, and implementation of the statute" demonstrates an unquestionable violation of the endorsement test. "Under God" was intruded into the Pledge to affirmatively proclaim that Americans, as a people, actively believe in God. Congress, therefore, not only made a law "**respecting** an establishment of religion," it made a law **establishing** religion – namely, Monotheism – in a country with millions of Atheistic[16] citizens.

(3) "Under God" in the Pledge fails the *Lemon* test

The Pledge had been serving its patriotic and unifying purposes for sixty-two years when Congress passed its Act of 1954.[17] Thus, it was neither a desire for patriotism nor for unity that instigated the intrusion of "under God" into that previously secular passage. Rather, the ostensible purpose was to distinguish us from the Soviet Union. Congress did that in an unconstitutional manner.

Highlighting the differences between the two societies was certainly reasonable, for the freedoms of American democracy were far superior to the subjugation of Soviet communism. But Congress misidentified the distinguishing feature. The repression of our rival fifty years ago was not

[14] H.R. 1693, 83rd Cong., 2nd Sess. (1954).
[15] 100 Cong. Rec. 7, 8618 (June 22, 1954) (Statement by President Dwight D. Eisenhower, as reported by Sen. Ferguson).
[16] Others – such as polytheists, pantheists, and those with "no religion" – are also excluded. Still more – including staunch Christians – are offended as well by this involvement of their religion in government.
[17] Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249.

due to Atheism any more than that of the Spanish five hundred years ago was due to Catholicism, or that of the Taliban five years ago was due to Islam. Our way of life was superior because we had religious freedom, not because of any one majority belief, and the reality is that – in declaring that ours is a land of Monotheists – Congress took a step backwards towards the religious totalitarianism it rightfully meant to protest. As a result, the purpose prong of the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), was violated. "The proper inquiry under the purpose prong of *Lemon* ... is whether the government intends to convey a message of endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring). As mentioned, Congress itself stated its purpose was: to "acknowledge the dependence of our people and our Government upon the moral directions of the Creator ... [and] to deny the atheistic and materialistic concepts of communism."[18] Thus, both endorsement (of Monotheism) and disapproval (of Atheism) were intended by the Act of 1954. This, of course, is facially apparent from a statute that does nothing but intrude the purely religious phrase, "under God," into a Nation's sole Pledge.

The process by which the religion was injected mirrors the legislative sequence in *Wallace*, where an existing statute allowing for a period of silence "for meditation" was altered to read "for meditation or voluntary prayer." *Id.* at 59. Because of the religious purpose of the added words, that change was ruled unconstitutional. Surely, affixing "under God" to the nation's official Pledge of Allegiance is a far greater offense than merely letting a state's individuals know that they can silently pray if they so choose.

Respondent acknowledges that it was Congress, not Petitioners, who committed this purpose prong violation. However, Petitioners' policies have perpetuated the religious

[18] H.R. 1693, 83rd Cong., 2nd Sess. (1954).

biases, thereby advancing impermissible effects. In essence, they have created a religious "test oath, and the test oath has always been abhorrent in the United States." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 644 (1943) (Black, J., concurring). Furthermore, no one can seriously deny that small children led by their teachers every day in reciting that ours is "one Nation under God" are inculcated with the belief that God exists. Is this not precisely how churches indoctrinate the children of their congregations? "Consciously or otherwise, teachers ... demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models." *Bethel School Dist. v. Fraser*, 478 U.S. 675, 683 (1986). Finally, the effect of Petitioners' Pledge policy – especially when added to the "true Americans believe in God" view that has been promoted – is to "sen[d] a message to nonadherents that they are outsiders, not full members of the political community" *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).[19]

Petitioners have an affirmative duty to remedy – not promote – situations where students are turned into "outsiders" due to their religious beliefs. As specified in the statement issued by the United States Department of Education on February 7, 2003,[20] "teachers and other public school officials may not lead their classes in ... religious activities," since such "conduct is 'attributable to the State' and thus violates the Establishment Clause." With a claim that ours is "one Nation under God," clearly "attributable to the State," how can Petitioners even allow, much less

[19] Petitioners have already admitted that Respondent has been turned into an "outsider" due to the now Monotheistic Pledge. EOR 173 (Transcript of May 15, 2000 at 37:8-20); EOR 187-188 (Transcript of May 15, 2000 at 51:21-52-1).

[20] *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools.* February 7, 2003. Accessed at http://www.ed.gov/policy/gen/guid/religionandschools/index.html. See also *Complaint* ¶ 82 (J.A. 50-51).

require, their "teachers and other public school officials" to engage in this practice? As the current Secretary of Education noted in response to the Ninth Circuit's ruling in this case, "under God" in the Pledge is an "expression of faith."[21] A group "expression of faith" – obviously in "God" – has religious effects, and violates *Lemon*'s second prong.

(4) "Voluntary" teacher-led daily recitations are coercive, especially when shrouded in patriotism

The "coercion test" – noted in *Engel v. Vitale* and refined in *Lee v. Weisman* – is also violated. In *Lee*, the Court looked at public and peer pressure, recognizing that "though subtle and indirect, [this pressure] can be as real as any overt compulsion." *Id.* at 593. This was the case with students on the brink of adulthood, who merely listened twice in their entire school careers as religious dogma was proffered by an invited guest. The coercion here – with younger, more impressionable children being encouraged by government-employed teachers to actively recite religious dogma more than 2000 times[22] – is vastly greater.

Coercion stems not only from the didactic nature of the teacher-student relationship (where pupils attempt to please their instructors), but from the aversion youngsters have to being saddled with the "outsider" status just noted. "[There is] influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure

[21] Secretary of Education Rod Paige issued a statement on the Ninth Circuit's decision. Although he clearly disapproved of the ruling, he acknowledged that, "under God" in the Pledge is an "expression of faith." Statement, June 27, 2002. Accessed at http://www.ed.gov/news/pressreleases/2002/06/06272002.html.

[22] Schools are in session at least 175 days per year. Cal. Ed. Code § 41420(a). With thirteen years of attendance, at least 2,275 school days are scheduled for each child.

upon children ..." *McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring). See also *Lee v. Weisman*, 505 U.S. at 593-594 (citing research confirming "pressure from their peers towards conformity").

Couching the constitutional transgression within a patriotic exercise does not lessen the offense. On the contrary, it exacerbates "the real conflict of conscience faced by the young student." *Lee v. Weisman*, 505 U.S. 577, 596 (1992). "'All of the eloquence by which the majority extol the ceremony of flag saluting as a free expression of patriotism turns sour when used to describe the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public.'" *Barnette*, 319 U.S. at 635 (n. 15) (citation omitted). This is neither hyperbole nor an abstract construct concerning hypotheticals. These are real effects, foisted upon real children, that can have severe social and intellectual adverse consequences. *Brief for amicus curiae Atheists and Other Freethinkers*. In fact, those consequences can be lifelong. *Id.* at 15. Petitioners have shown no countervailing benefits that outweigh these harms. The comfort the majority feels from governmental displays of its preferred religious dogma should not be paid for with stigmatization and emotional turmoil inflicted upon a subset – whatever its size – of our youngest citizens.

C. NONE OF THE PROFFERED ARGUMENTS JUSTIFIES THIS ESTABLISHMENT CLAUSE VIOLATION

(1) There is a marked difference between an acknowledgment and an endorsement of religion. A Pledge to "one Nation under God" is an "endorsement"

Petitioners contend that if the Court strikes "under God" from the Pledge, "the Declaration of Independence, the

Constitution, the Star Spangled Banner, and Lincoln's Gettysburg Address, to name a few, would all have to be excised from public schools." *Pet. Br.* at 31. The argument is without merit, and stems from a contortion of the "acknowledgment" versus "endorsement" classification system this Court has developed.

"Acknowledgments" simply take cognizance of undisputed facts. "Government must inevitably take cognizance of the existence of religion." *Abington*, 374 U.S. at 306 (Goldberg, J., concurring). As long as the support (or derogation) of a religious idea is not the purpose of those "acknowledgments," they are perfectly acceptable. Thus, taking cognizance of the fact that the Declaration of Independence contains "Nature's God" and "endowed by their Creator" is no more an Establishment Clause violation than taking cognizance of the fact that George Washington, Thomas Jefferson and James Madison owned black people is a violation of Equal Protection.

This is fundamentally different from "endorsement," where one takes a position on a matter of controversy. At the present time, for example, American troops are in Iraq. That is an acknowledgment. Should they be there, or should they not? Taking one side or the other would be an endorsement.

Of course, at times there is an "obligation to draw lines, often close and difficult lines, in deciding Establishment Clause cases." *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring). For instance, a discussion of the religious beliefs of the Framers might be appropriate in a class on Early American History, and a teacher there might properly "acknowledge" the fact that Thomas Paine considered Christianity to be "repugnant to reason."[23] However, if that teacher added only that John Adams wrote, "the Cross. Consider what calamities

[23] Paine T. *The Age of Reason*. (1794).
Accessed at http://libertyonline.hypermall.com/Paine/AOR-Frame.html

that engine of grief has produced!,"[24] that Thomas Jefferson wrote, "The day will come when the mystical generation of Jesus by the Supreme Being in the womb of a virgin, will be classed with the fable of the generation of Minerva in the brain of Jupiter,"[25] and that James Madison wrote that Christianity has led to little except "superstition, bigotry and persecution,"[26] it is likely that "endorsement" would have occurred. The reason is obvious; under the Establishment Clause, public school teachers are properly forbidden from "endorsing" the idea that Christianity is bad.[27]

So, too, are they properly forbidden from endorsing the idea that Christianity – or belief in God – is good. Government may not "endorse" any religious view, or assess how virtuous or evil a religious ideal may be. Although District Court opinions are rarely cited in briefs to this Court, the words of Judge Battin remain poignant and wise:

> Neither this Court, nor any branch of this Government, will consider the merits or fallacies of a religion. ... Nor will the Court praise or condemn a religion, however excellent or fanatical or preposterous it may seem. Were the Court to do so, it would impinge upon the guarantees of the First Amendment.

[24] John Adams (Letter to Thomas Jefferson, September, 3 1816), in *The Adams-Jefferson Letters*, Cappon, LJ, ed. (Chapel Hill: University of North Caroline Press, 1987), at 487-88.
[25] Thomas Jefferson (Letter to John Adams, April 11, 1823), in *The Adams-Jefferson Letters*, Cappon, LJ, ed. (Chapel Hill: University of North Caroline Press, 1987), at 591-594.)
[26] Madison J. "Memorial and Remonstrance Against Religious Assessments" (June 20, 1785). *The Papers of James Madison*. Hutchinson WT et al., eds. (University of Chicago Press, Chicago, 1962—77). Vol. 5 at 83 (¶ 7).
[27] "Endorsement" generally suggests favoring a particular positive view. As used in this context, however, it is a shorthand for both "favoritism" and "disapproval."

Universal Life Church, Inc. v. United States, 372 F. Supp. 770, 776 (E.D. Cal. 1974).

When Congress stated that belief in God led to "the concept of the individuality and the dignity of the human being," H. Rep. No. 1693 at 2, whereas Atheism was associated with "subservience of the individual," *id.*, and "spiritual bankruptcy," S. Rep. No. 1287, 83d Cong., 2d Sess. 2 (1954), it was engaging in endorsement of Monotheism and disapproval of Atheism. Petitioners act no less impermissibly when they cultivate, preserve and perpetuate those notions, especially in the public schools.

Respondent understands that the majority of Americans have a deep regard for their preferred Monotheistic religious ideal. Many in that majority, however, seem unable to recognize that Respondent and others who deny Monotheism have the same depth of commitment to their views. This highlights the reason the Establishment Clause exists, for while "God" may well solemnize public occasions for the majority of citizens, paying homage to such a notion in the midst of an important ceremony denigrates and trivializes the affair for others. Similarly, confidence in the future may be the result of acknowledgments of God for those who believe. The nonbeliever, however, may see only a horrid past, filled with burnings at the stake, religious wars and suicide bombers. Government may not endorse either view.

(2) Government does not escape the requirements of the Establishment Clause by combining religious activity with patriotic activity.

Petitioners make the argument that "[t]he Pledge is, quite simply, a patriotic act – not a religious act," *Pet. Br.* at 31. Apparently they believe that referring to EGUSD's "Patriotic Observance policy" – and ignoring that the Pledge was also "a patriotic act" during its sixty-two secular years – they can divert attention from the constitutional infirmity of their

deeds. This is based on two flawed constructs. First, they take the Pledge as a "whole." Of course, by that approach, the Clause would never be violated. In *Santa Fe*, for instance, the argument would be, "A football game is, quite simply, a sports competitive act, not a religious act." In *Lee v. Weisman*: "A graduation is, quite simply, a celebratory act – not a religious act." *Wallace*, *Abington*, and *Engel* would assert that "Morning exercises are, quite simply, behavioral control acts, not religious acts." But just as no one in the past challenged morning exercises, graduations or football games, Respondent here – as previously noted – is not challenging pledging allegiance. He is challenging the intrusion of religious dogma into an otherwise patriotic exercise.

The second construct – that because "under God" references our nation's history, it is a commendable example of patriotism – fares no better. The United States was founded on freedom of conscience, not on Monotheism. The fact that the framers believed in God is of no more "historical" relevance in terms of a pledge of allegiance than that they were Caucasian or that they were male. Likewise, their favoring Monotheistic belief is of no more relevance than their favoring male superiority ("[T]he position of women in this country at its inception [was] reflected in the view expressed by Thomas Jefferson that women should be neither seen nor heard in society's decisionmaking councils," *Frontiero v. Richardson*, 411 U.S. 677, 685 n.13 (1973)), or their favoring whites (see United States Constitution, Art. I, Sections 2 and 9, and Art. IV, Section 2). Could that "history" justify "one Nation of male greatness" or "one Nation of white achievement?"

These latter two clauses would undoubtedly be seen as discriminatory. But, constitutionally, they are no more so than "under God." It is interesting that the Court last term noted that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if

the dream of **one Nation, indivisible**, is to be realized." *Grutter v. Bollinger*, 123 S. Ct. 2325, 2340-2341 (2003) (emphasis added). "One Nation, **under God**, indivisible," was not employed, possibly due to the realization that effective participation by members of all religious groups is also essential to the realization of that dream, and that "under God" is divisive.

In any event, the text of the Constitution, and the deliberations leading to it, contradict the claim that Monotheistic belief was one of "the foundational values underlying the American system of government." *Br. for the United States* at 37. During the constitutional debates, one finds minimal mention of God, the Bible, Jesus, the Ten Commandments or even the Declaration of Independence. Rather, one sees a remarkable lack of significant references to any of those entities, and a resulting document staggering for its secularity. Despite sectarianism and references to the Almighty in virtually every state constitution, the national constitution has neither. In fact, the only reference to religion is in Article VI, cl. 3, which states that, "no religious test shall ever be required as a qualification to any office or public trust under the United States." This is the case even though religious oaths of office were pervasive throughout the colonies. Likewise, the only oath contained in the Constitution – that of the President – has no "So help me, God" or any other of the theistic references that were standard for the day. Article II, Section 1, cl.7. If this is not telling enough, the creation of the oath of office for the members of Congress, themselves, certainly sends the death knell to the notion that the Framers considered belief in "God" to be a "foundational" part of this government.

On April 6, 1789, a committee of five individuals was assigned "to bring in a bill to regulate the taking the oath or affirmation prescribed by the sixth article of the

Constitution." 1 Annals of Cong. 102 (1789). It was resolved:

> That the form of the oath to be taken by the members of this House, as required by the third clause of the sixth article of the Constitution of Government of the United States, be as followeth, to wit: "I, A.B., a Representative of the United States in the Congress thereof, do solemnly swear (or affirm as the case may be) in the presence of Almighty GOD, that I will support the Constitution of the United States. So help me God."

The final version of the oath, however – "as required by the third clause of the sixth article of the Constitution" – was, "I, A.B., do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States." 1 Stat. 23. Thus, it wasn't as if the First Congress – busy with all their duties creating a new nation – simply failed to consider bringing God into the oath. **They affirmatively removed both references to God.** For what conceivable reason would this have occurred except to adhere to the notion that "the Constitution is neither hostile nor friendly to any religion; it is simply silent on the subject, as lying beyond the jurisdiction of the general government."[28] As Justice Frankfurter wrote:

> The Establishment Clause withdrew from the sphere of legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation.

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[28] *Church and State in the United States or The American Idea of Religious Liberty and Its Practical Effects*, Philip Schaff, Arno Press, New York Times Company, New York: (1972) at 39-40.

McGowan v. Maryland, 366 U.S. 420, 466 (1961) (Frankfurter, J., separate opinion).

"[N]o law respecting an establishment of religion" was an idea previously unknown among civilized governments. If this unequivocal textual mandate was meant to be trumped by remembrances that "the United States was founded on a fundamental belief in God," *Pet. Br.* at 33, why would "He" be completely absented from the document? With that "defect" noted while the Constitution, itself, was being ratified,[29] why wasn't it "remedied?" Why not write "no law … except to recognize God," or otherwise replicate any of the similar colonial constitutional provisions in existence? The reality is that "freedom of conscience" was the foundational idea, and "some explicit acknowledgment of the only true God and Jesus Christ whom He has sent, inserted somewhere in the Magna Carta of our country"[30] was of no significant concern.

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[29] See, *e.g.*, Letter of Luther Martin, January 27, 1788, as printed in *Elliot's Debates*, Vol. 1 at 385-86: "[T]here were some members so unfashionable as to think that a belief of the existence of a Deity, and of a state of future rewards and punishments, would be some security for the good conduct of our rulers, and that, in a Christian country, it would be at least decent to hold out some distinction between the professors of Christianity and downright infidelity or paganism." Accessed at http://memory.loc.gov/ammem/amlaw/lwed.html.

[30] Letter of First Presbytery Eastward in Massachusetts and New Hampshire to George Washington, October 27, 1789; in McAllister D. *Testimonies to the religious defect of the Constitution of the United States*. Christian Statesman *Tract No. 7*, Philadelphia (1874) at 2-3. McAllister's tract was an attempt to demonstrate that "[t]his defect … never passed altogether unnoticed" by placing all "testimony" into "one complete summary." *Tract No. 7* at 1. Yet, for the 22 years between 1790 and 1812 – when Timothy Dwight gave his famous discourse (see *Petition for Writ of Certiorari*, No. 03-7 at 8-9) – McAllister apparently could find only three protestations within all of the colonial literature. *Tract No. 7* at 3-4.

(3) Petitioners' policies perpetuate the prejudices suffered by Atheists such as Respondent, and interfere with his ability to show his child the beauty and benefits of his religious belief system

This case is, in actuality, a civil rights case. In fact, the situation today for Atheists is analogous to that for African Americans a few generations ago. To be sure, there is a marked difference conceptually between an immutable characteristic like race, and a "chosen" characteristic such as religion. However, under our Constitution, those two attributes are treated identically, and this case will likely be resolved either like *Plessy v. Ferguson*, 163 U.S. 537 (1896) or like *Brown v. Board of Education*, 347 U.S. 483 (1954).

Because it has likely never been noticed by many in the Monotheistic majority, the pervasive prejudice against Atheists – among the most consistently, flagrantly and officially disenfranchised minorities in our society – merits review. In fact, discriminatory treatment for denying the existence of "God" has been occurring for centuries. The Bible of the God introduced by the Act of 1954 itself declares that Atheists are "corrupt … there is none that doeth good" (Psalms 14:1) and equates disbelief in God with "unrighteousness" (2 Corinthians 6:14). Prior to the implementation of our constitutional religious protections, denying God's existence was punishable "by fine and imprisonment, or other infamous corporal punishment." 4 Blackstone Commentaries 59. Of the eleven state constitutions in existence during the framing of our secular federal constitution, nine required professions of belief in God to obtain full benefits of citizenship. App. A, *infra*.

This is precisely the sort of prejudice that led this Court to recall that "Madison … eloquently argued … that cruel persecutions were the inevitable result of government-established religions." *Everson v. Board of Educ.*, 330 U.S. 1, 12 (1947). Accordingly – with government having

established Monotheism as the nation's religious creed – intolerance towards Atheists has never subsided. In 1946, for example, more than half of Americans felt that Atheists shouldn't even be allowed to broadcast their views.[31] Two generations ago, when 6% of the population was willing to deny the right to vote to high school dropouts, 27% would have denied that right to Atheists.[32] Were an Atheist candidate to seek elected office then, **more than three quarters** of Americans would have refused to endorse his candidacy on that basis alone.[33]

The current situation is hardly better, with still less than half of all Americans willing to vote for an Atheist,[34] and studies showing that "voters have a far more favorable impression of every religion tested than they do of Atheists. Just 32% hold a favorable opinion of atheists."[35] Although no longer of any legal effect, *Torcaso v. Watkins*, 367 U.S. 488 (1961), eight states still have clauses in their constitutions – today in 2004 – specifically denying to Atheists the right to hold elected office;[36] it seems not one of the combined 1328 state legislators has been willing to risk his or her career to eliminate those extraordinarily offensive constitutional provisions. In fact, this religious choice is so

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[31] J.A. 59 (note 17).

[32] J.A. 60 (note 20).

[33] J.A. 59 (note 19).

[34] Poll Analyses, Reported March 29, 1999 by the Gallup Poll News Service. AOB at 4. At least 92% of the respondents would vote for a candidate who was "Black," "Catholic," "Baptist," "a woman," or "Jewish." For atheists, the figure was 49%.

[35] *Religion and Politics: the Ambivalent Majority*, The Pew Research Center for the People and the Press in association with The Pew Forum on Religion and Public Life, September 20, 2000 (accessed at http://people-press.org/reports/print.php3?PageID=177). Additionally, that same number (32%) held "Very Unfavorable" opinions of Atheists. This can be contrasted with 3% for Evangelical Christians, 3% for Jews and 3% for Catholics and 8% for Muslim Americans.

[36] *Petition for a Writ of Certiorari*, #03-7, at 16, note 14.

unpopular that politicians – who normally bend over backwards to avoid insulting any minority – freely cast about anti-Atheist slurs.[37] Just last year, the Charleston, South Carolina, city council agreed for the first time to have an Atheist provide the invocation. Council members literally walked out of the room before he spoke his first words.[38] And among those officials not affirmatively denigrating adherents of this religious sect, the very existence of Atheists is often completely disregarded.[39]

"Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). This is especially so when they are based on such characteristics as race, color, gender, national origin or religion. See, *e.g.*, 42 USCS § 2000e-2(a)(2) (concerning discrimination in employment). For the first four of these qualities, this restriction is now meticulously observed. But for religion – at least in regard to Atheists – government has certainly "given effect" to the "private biases." Thus, every session of Congress begins with a prayer to God;[40] every President

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[37] "An atheistic American ... is a contradiction in terms" J.A. 36. See also *Petition for Certiorari*, #03-7, at 16 (note 16) for more examples.

[38] Hardin J. "Some on city council snub atheist's invocation" Charleston Post and Courier, March 27, 2003 (accessed at http://www.charleston.net/stories/032703/loc_27atheist2.shtml).

[39] See, *e.g.*, President Bush's proclamation for Thanksgiving Day 2001 ("Americans **of every belief and heritage** give thanks to God") or for the National Day of Prayer 2003 ("America welcomes individuals of all backgrounds and religions, and our citizens hold diverse beliefs. In prayer, we share **the universal desire** to speak and listen to our Maker.") Accessed at http://www.whitehouse.gov/news/proclamations/. (Emphases added).

[40] "During the past two hundred and seven years, all sessions of the Senate have been opened with prayer, strongly affirming the Senate's faith in God as Sovereign Lord of our Nation." (http://www.senate.gov/reference/office/chaplain.htm); "The formal prayer before each legislative session ... calls forth a nation to stand with

begins his tenure by invoking God's name (first in his oath of office, and then in his inaugural address);[41] Congress has directed the President to "issue each year a proclamation designating ... a National Day of Prayer on which the people of the United States may turn to God ...;"[42] this Court starts its proceedings with "God save the United States and this Honorable Court;"[43] "In God We Trust" is our national motto;[44] those words are required to be engraved on every coin[45] and all currency;[46] we have Thanksgiving and Christmas (honoring God and Jesus, respectively) as national holidays;[47] and avowals of faith in God are present in virtually every state constitution.[48] To be sure, these practices are not aimed at Atheists. On the contrary, they are undoubtedly seen as benevolent and positive traditions. However, "no tradition can supersede the Constitution." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 96 n.1 (1990) (Scalia, J., dissenting).

This is precisely where the analogy to the treatment of African Americans holds true. Those who supported laws enforcing segregation saw them as benevolent and positive traditions, too. Thus, lawmakers responded with fury to this Court's decision in *Brown:*

> The Court holds that the segregation of white and colored children in public schools has a detrimental effect upon the colored children. What about the white children? Do they not, also, have rights? Will

its leaders and say in unison: 'In God we Trust.'" (http://chaplain.house.gov/index.php).

[41] *Brief for amicus curiae Liberty Counsel*, at 8-13.

[42] 36 U.S.C. § 119.

[43] 1 C. Warren, The Supreme Court in United States History 469 (1922).

[44] 36 U.S.C. § 302.

[45] 31 U.S.C. § 5112(d)(1).

[46] 31 U.S.C. § 5114(b).

[47] 5 U.S.C. § 6103(a).

[48] *Br. for the United States*, at 33 (referencing its App. B).

> not the commingling of the races in public schools have a detrimental effect upon white children?

100 Cong. Rec. 5, 7252 (May 27, 1954) (remarks of Senator James O. Eastland of Mississippi). Similarly, Judge Leon Bazile was undoubtedly representing the predominant view of the people of Virginia when he wrote that "[t]he fact that [God] separated the races shows that he did not intend for the races to mix." *Loving v. Virginia*, 388 U.S. 1, 3 (1967). Yet, since *Brown* and *Loving* were decided, racial prejudice has decreased remarkably. Whereas 54% of the population would not vote for a black candidate in 1958,[49] that number – now that government-supported segregation has ended – is down to 4%, tied at the lowest figure for any of the groups tested.[50] For Atheists, the percentage remains at nearly the level it was for African Americans a half century ago: 48%.[51] Is it not likely that leading every public school student in a daily recitation that ours is "one Nation under God" perpetuates this prejudice? Surely the message is that Atheists are "outsiders" and not as "American" as those who adhere to the government's pervasive Monotheistic views.

"[O]ur democratic form of government, functioning under the historic Bill of Rights, has a high responsibility to accommodate itself to the religious views of minorities, however unpopular and unorthodox those views may be," *Jones v. Opelika*, 316 U.S. 584, 624 (1942) (Black, Douglas, Murphy, JJ, dissenting). Public school officials may not begin each classroom's day with a claim that Atheists are wrong, and the fact that our motto, legislative chaplains, etc., all make the same claim, see, *e.g.*, *Br. for the United States* at 25-26, does not make this constitutional infraction permissible. That argument – again analogizing with our

[49] J.A. 59 (n.19).

[50] Gallup Poll-A.I.P.O. (given Feb 19-21, 1999, reported March 29, 1999).

[51] *Id.*

history of government-condoned racism – is no more valid than one stating that segregation in the schools should have been upheld in *Brown* because there were racially segregated water fountains, railroad cars, housing developments and swimming pools. The Court recognized the problem when gender bias was at issue in *Frontiero v. Richardson*, 411 U.S. 677 (1973), refusing (as in *Brown*) to "rely on the effects of ... past discrimination as a justification for heaping on additional ... disadvantages." *Id.* at 689 (n. 22). It is time to apply that theory to religion. Until that occurs, Respondent will have to engage an unreasonable burden in imparting his religious views to his child. He finds great benefits in an Atheistic life, and he should be able to extol them without Petitioners' interference.

(4) None of the other attempts to justify this Establishment Clause transgression have merit

Petitioners have alluded to the "numerous official references to vows or invocations of divine guidance" that have existed previously and that exist today. *Pet. Br.* at 36. However, those are **all** very different from the practice challenged in this case. Unlike the motto, the money or the supplications to God engaged in by governmental officials, here it is public school children at whom the religious dogma is directed. Here, those young citizens actively participate in the religious exercise. Here, they are coerced – whether forcefully or subtly – to acknowledge the Deity. Here, there is actual vocalization of the religious verbiage. Here, there is a promise. An oath. A Pledge of Allegiance that "requires affirmation of a belief and an attitude of mind." *Barnette*, 319 U.S at 633.

That school officials would be actively working to perpetuate this behavior, rather than maintaining absolute vigilance to preclude its first appearance, is something Petitioners have yet to explain. Either way, the listing of

numerous questionable practices does nothing to defend the practice before the Court, since "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring). Surely, the circumstances just noted are highly unique.

This need for an individualized examination was shown forty years ago when "Bible-reading in the schools of the District of Columbia" was placed on one list of "'"aids" to religion in this country at all levels of government.'" *Engel*, 370 U.S. at 437 (Douglas, J., concurring) (citation omitted). Such Bible-reading was declared unconstitutional the very next term, once that routine was "judged in its unique circumstances." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

Petitioners also cite *Marsh v. Chambers*, 463 U.S. 783 (1983) (*Pet. Br.* at 41-43), an anomalous case that has already been distinguished from the school setting. "Inherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh*." *Lee*, 505 U.S. at 596. The approval of legislative prayer in *Marsh* rested on an "unambiguous and unbroken history of more than 200 years." 463 U.S. at 792. The sectarian religious dogma in the Pledge, in contrast, wasn't interposed until sixty-two years after that oath's creation, which, itself, took place more than 100 years after the founding. In fact, the Pledge has actually existed in a constitutional form longer than it has been religious. That is hardly an "unambiguous" or "unbroken" history for "under God." *Marsh* also involved adults in the legislature, who could enter or leave at will. Here, there are children in the public schools, "left with no alternative but to submit." *Lee*, 505 U.S. at 597. Finally, the continued validity of *Marsh* is itself suspect, since its holding has been clearly contradicted: "[T]he religious liberty protected by the Constitution is abridged when the

State affirmatively sponsors the particular religious practice of prayer." *Santa Fe*, 530 U.S. at 313.

The claims of the dissents at the Ninth Circuit are equally unsound. For instance, "the danger that 'under God' in our Pledge of Allegiance will tend to bring about a theocracy or suppress somebody's beliefs is so minuscule as to be *de minimis*," was heard from the dissenting judge on the panel. App. to Cert. 19 (Fernandez, J., dissenting). This is an excellent example of the individualized and limited views that exist in religion, and the need to counter those with a strong Establishment Clause. To begin with, suppression of religious belief has never been required to find a Religion Clause violation. More important is the showing that adherents of one religious philosophy often readily dismiss what may be incredibly apparent to those of different faiths. Atheists such as Respondent see an onerous theocracy already in existence, and extreme offensiveness in public school teachers pressuring children into accepting (as true) religious notions their parents expressly believe to be false. The dissent sees this as a "*de minimis*" harm.

"[T]he national uproar caused by the Ninth Circuit's [initial] decision," *Pet. Br.* at 42, proved that the matter is not "*de minimis*." "It is not that the use of those ... words can be dismissed as '*de minimis*' - for I suspect there would be intense opposition to th[eir] abandonment." *Abington*, 374 U.S. at 303 (Brennan, J., concurring) (referring to the motto. The clamor heard in June, 2002, was in response to **removal** of religion from government, which conflicts with no constitutional ideal. Certainly, then, one would expect a federal appellate judge to understand that an already disenfranchised minority might protest the **intrusion** of religious dogma – specifically contrary to their beliefs – into a government-sponsored oath. Moreover, this minority population must endure this oath being used to indoctrinate their children in the public schools.

"[M]ost sects in Religio[n] think themselves in possession of all truth, and that wherever others differ from them it is so far error."[52] Underlying the Establishment Clause is the idea that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981). The judiciary exceeds its bounds when it even begins to assume it – or any other entity – has the power to validate the feelings of adherents to other religions.

The dissent from the denial of rehearing *en banc* similarly had arguments that stem from a Monotheistic bias. For instance, noting that "the [Supreme] Court took pains to stress that not every reference to God in public schools was prohibited," *App. to Cert.* 76 (O'Scannlain, J., dissenting from denial of rehearing en banc), the discussion continued as if a daily group pledge professing belief in a frequently debated religious matter is a mere "reference." The dissent then made the claim that ending fifty years of an unconstitutional governmental preference for belief in God "confers a favored status on atheism in our public life." *Id.* Under that logic, of course, this Court "conferred favored status" on the Chinese in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and on African Americans in *Brown v. Board of Education*. Obviously, those are inaccurate conclusions.

Petitioners and their *amici* have staked a significant part of their argument on "ceremonial deism" (see, *e.g.*, *Pet. Br.* at 9, 37) – a term that has never been analyzed by the Court. This label originated as a third-hand reference, *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting); considered in the subjunctive, *id.*; first quoted with uncertainty, Sutherland, Book Review, 40 Ind. L. J. 83, 86 (1964); and introduced to

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[52] Benjamin Franklin's September 17, 1787 concluding speech, as reported in Madison's *Debates in the Federal Convention*, accessed at http://www.yale.edu/lawweb/avalon/debates/917.htm.

describe church-state matters which "can be accepted as so conventional and uncontroversial as to be constitutional." *Id.* Obviously, "[t]he public and political outcry throughout our country when this decision was published," *EGUSD Petition for Certiorari* at 14, removes the Pledge from that realm. Second, it is unlikely that "deism" is accurate. Deists – of which there were many among the founders – specifically denied a God who involved himself in the affairs of man. *Lee*, 505 U.S. at 617 (Souter, J., concurring). Those structural concerns aside, what is there to limit a "ceremonial" designation? Why weren't daily prayers, Bible readings, and invocations at graduations labeled "ceremonial?" Besides, what is "ceremonial" in religion depends on one's religious beliefs. Swearing on a Christian Bible in Court may well be purely "ceremonial" to a Baptist, but it would likely be otherwise to a devout Muslim, Atheist, Buddhist, or Jew. Finally, if a religious belief has become so accepted that it is deemed "ceremonial" – or "woven into the 'fabric of our society,'" *Pet. Br.* at 10; *Br. for the United States* at 28 and 46 (citing *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)) – it is essentially an admission of a religious "establishment." "When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause. However 'ceremonial' their messages may be, they are flatly unconstitutional." *Lee*, 505 U.S. at 631 (Souter, J., concurring).

The inadequacy of all of these Establishment Clause violation excuses can be readily recognized by simply reflecting upon the question Respondent has repeatedly asked throughout this litigation: How does "one Nation, under God" differ constitutionally from "one Nation, under Jesus?" Obviously, the Court would never allow a Pledge with such wording to remain in our public educational

systems. Yet every argument advanced for "under God" is just as "valid" for "under Jesus."

Putting "under Jesus" into the Pledge, for instance, wouldn't change the fact that it is still the Pledge of Allegiance. Therefore, Petitioners' claim that "[t]he Pledge is, quite simply, a patriotic act – not a religious act" would still apply. The federal Constitution's Article VII use of "the Year of our Lord" obviously refers to Jesus, and its presence in the Constitution makes it certainly of more weight than the reference to the "Creator" within the Declaration of Independence. Thus, "under Jesus" is just as "historical" and "foundational" as is "under God." Every chaplain in the history of the House[53] and Senate[54] has been Christian, so "under Jesus" is supported under *Marsh*'s "unambiguous and unbroken history" rule. Disregarding the "outsider" test works just as well for "under Jesus" as it does for "under God," since only a few percent more people will attain "outsider" status. J.A. 72. With a Supreme Court Chief Justice having publicly stated that the United States is "a Christian land governed by Christian principles,"[55] "under Jesus" can surely be "woven into the fabric of our society." "[T]he danger that 'under [Jesus]' in our Pledge of Allegiance will tend to bring about [Christianity] or suppress somebody's beliefs" would be "minuscule" and "*de minimis*." If America's Muslims and Jews demand an end to fifty years of "under Jesus," the objection that such a reversion would "confe[r] a favored status on [those sects] in our public life" would be just as logical. Plus, with purely

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[53] http://chaplain.house.gov/histInfo.php.

[54] http://www.senate.gov/artandhistory/history/common/briefing/Senate_Chaplain.htm.

[55] "Eisenhower Joins in a Breakfast Prayer Meeting." New York Times, February 5, 1954, A-10.

Christian prayers delivered at presidential inaugurations,[56] isn't it all just "ceremonial Christianity," anyway?

(5) In addition to its holdings, the Court's repeated statements of Establishment Clause principles demand affirmance

Although the Court maintains a "customary refusal to be bound by dicta," *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994), Petitioners seek to overturn the Ninth Circuit's decision by contending that "this Court has repeatedly observed that the Pledge is consistent with the Establishment Clause." *Pet. Br.*, at 34. That contention is not quite accurate.

To begin with, the conclusion "that the Pledge is consistent with the Establishment Clause" cannot be found in any of the Court's opinions. Rather, the quite different statements – i.e., that the Pledge is one of many existent practices, or that the given decision does not require the Pledge's invalidation – have been made. See, *e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984) (merely giving "examples of reference to our religious heritage"); *Abington*, 374 U.S. at 281 (Brennan, J., concurring) ("It has not been shown that ... daily recitation of the Pledge of Allegiance ... may not adequately serve ... secular purposes"); *Engel*, 370 U.S. at 435 n.21 ("nothing in the decision reached here ... is inconsistent" with the Pledge); *id.* at 437 n.1 (1962) (citation omitted) (Douglas, J., concurring) (listing the Pledge as one of the "'many "aids" to religion in this country'"). Even in *Wallace*, where Justice O'Connor was responding to Chief Justice Burger's suggestion that the majority opinion

[56] The January 20, 2001 inauguration included "We pray this in the name of the Father and of the Son, the Lord Jesus Christ, and of the Holy Spirit. Amen." (Invocation of Rev. F. Graham); "We respectfully submit this humble prayer in the name that is above all other names, Jesus the Christ." (Benediction of Pastor K. Caldwell.) 147 Cong. Rec. S421-05.

demanded revision of the Pledge, her disagreement was limited only to the one argument that invalidating "under God" in the Pledge was required due to the fact that a preexisting law had been changed for religious purposes. *Wallace*, 472 U.S. at 78 n.5 (O'Connor, J., concurring). Finally, Respondent has addressed Justice Blackmun's singular dictum about dicta, *Allegheny*, 492 U.S. at 602-03, multiple times and in depth. See AOB at 44-50.

Second, the dicta provided have always been made in passing, with no discussion of the Pledge, its history, or its effects. It is inappropriate to place significant weight on a statement that "has never received full plenary attention." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979). "This is particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (citation omitted). Moreover, the dicta Petitioners reference are dated, perfunctory, rare, and incompatible with a veritable mountain of principled declarations from virtually all of the Court's Establishment Clause cases ... including those being referenced by Petitioners. In his *Complaint*, for instance, Respondent's App. G listed **two hundred separate statements**, any of which – if applied to the Pledge – would reveal its unconstitutionality. EOR 68-82. That document's App. F was comprised of fifty-four additional excerpts just from *Lee v. Weisman*. EOR at 62-67. All indicate that the Ninth Circuit ruled correctly.

The four times the Pledge has been referenced in dissent are especially instructive, inasmuch as they show that Supreme Court justices have, themselves, repeatedly recognized that the Court's Establishment Clause

jurisprudence requires invalidating the Act of 1954.[57] For instance, in *Wallace*, "the established principle that the government must pursue a course of complete neutrality toward religion" was reiterated. *Id.* at 60. Chief Justice Burger appropriately queried, "Do the several opinions in support of the judgment today render the Pledge unconstitutional? That would be the consequence of their method."[58] *Id.* at 88 (Burger, C.J., dissenting). Dissenting in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), Justice Scalia provided a list of practices (including the Pledge of Allegiance) which he indicated conflict with the plurality's "assertion ... that government may not 'convey a message of endorsement of religion'" *Id.* at 29-30 (Scalia, J., dissenting).

The "outsider" test, as utilized in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), was the third test noted to be unworkable in relation to the Pledge. There, Justice Kennedy noted what is irrefutable: "[I]t borders on sophistry to suggest that the ""reasonable"" atheist would not feel less than a ""full membe[r] of the political community"" every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false." *Id.* at 672-673 (Kennedy, J., dissenting). He continued, "Thanksgiving Proclamations, the reference to God in the Pledge of Allegiance, and invocations to God in sessions of Congress and of this Court ... constitute practices that the Court will

[57] The dissenters clearly did not want the Pledge ruled unconstitutional. Nonetheless, they correctly assessed that the given majority analysis required such a conclusion.

[58] Incidentally, the Chief Justice's analysis showed that "under God" is religious, and that Congress inserted the words "under God" to endorse a religious view: "The House Report on the legislation amending the Pledge states that the purpose of the amendment was to affirm the principle that 'our people and our Government [are dependent] upon the moral directions of the Creator.'" 472 U.S. 38 (Burger, C.J., dissenting) (n. 3) (citation omitted).

not proscribe, but that the Court's reasoning today does not explain." *Id.* at 674 n.10 (Kennedy, J., dissenting).

Justice Kennedy brought to the fore the very real issue of "coercion" in *Lee v. Weisman*, 505 U.S. 577 (1992). There is no question that small children have essentially no choice but to join their fellow students when led by their teachers in a daily ritual, or that the rare young person with sufficient fortitude to display her disbelief in God would not be ostracized in today's society by exempting herself from such a routine. Justice Scalia, in his *Lee* dissent, argued that "[i]f students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced, moments before, to stand for (and thereby, in the Court's view, take part in or appear to take part in) the Pledge." *Id.* at 639 (Scalia, J., dissenting).

Thus, justices of this Court have acknowledged that the neutrality, endorsement, outsider and coercion tests all demand removal of "under God" from the Pledge. They may not have liked the result of those Establishment Clause methodologies, and they assuredly knew that the majority of citizens would also be displeased. Nonetheless, "[d]edication to the rule of law requires judges to rise above the political moment in making judicial decisions." *Republican Party v. White*, 536 U.S. 765, 803 (2002) (Stevens, J., dissenting). See also *Texas v. Johnson*, 491 U.S. 397, 420-421 (1989) (Kennedy, J., concurring):

> The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision.

II. RESPONDENT HAS STANDING

A. RESPONDENT HAS PARENTAL STANDING

The Ninth Circuit panel examined the issue of standing, ruling unanimously that Respondent has standing in this matter. *App. to Cert.* 96. This ruling was dependent upon a state law question, and this Court "ha[s] a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law." *Bowen v. Mass.*, 487 U.S. 879, 908 (1988). The Ninth Circuit correctly determined that Respondent has suffered a "concrete and particularized," "actual" "injury in fact," caused by Petitioners, which can be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (citations omitted).[59]

As an initial matter, it should be noted that Respondent has been intimately involved in parenting his child since before her birth. See, *e.g.*, App. C1:10-18 (mother's declaration, recognizing the "close relationship" between Respondent and their daughter in 1999). He has shared physical custody throughout this litigation. "Mr. Newdow and I share physical custody of the child." J.A. 82 (¶ 3). "In the state court custody case, Respondent was given[60] joint custody of his minor child," *Pet. Br.* at 8, and the Family Court specifically noted, "You have total right of sole physical custody during those periods you have the child," App. B4:22-24, *infra*.[61] Thus, Respondent takes issue with

[59] Despite the strained arguments of the United States, *Br. for the United States* at 16-17, causation and redressability are obvious. Thus, only the "injur[ies] in fact" will be discussed.

[60] Petitioners, like the family courts, need to understand that citizens are not "given" their fundamental constitutional rights.

[61] On September 17, 2003, Respondent notified this Court of the latest (September 11, 2003) custody order, restoring "joint legal custody." The Solicitor General and counsel for the mother of Respondent's child responded to that letter on September 22, lodging copies of the transcript of the California Family Court's 9/11/03 statement. Petitioners have

the contention that he is a "noncustodial" parent. In California, "neither the Family Law Act nor the Welfare and Institutions Code specifically defines either custodial or noncustodial parent." *County of Ventura v. George*, 149 Cal. App. 3d 1012, 1017 (Cal. App. 2d Dist. 1983). Respondent has joint custody of his child. He is a custodial parent.

The sequence of events in this case is important in assessing the standing issue. This lawsuit was first filed on March 8, 2000. EOR at 1.[62] At that time, Respondent had full joint legal custody. Thus, there was no question as to his standing as a parent in bringing this litigation. In fact, it was not until February 6, 2002 – when "sole legal custody" was awarded to the mother – that his legal custody was in any way diminished. J.A. 82 (¶ 2). This was nearly a year after all the briefing in the Ninth Circuit Court of Appeals had been completed. J.A. 14 (file "certified" on March 2, 2001). Since then, "joint legal custody" has been restored. J.A. 127.

included that statement in the Joint Appendix. J.A. 89-131. Because an accurate determination of the intent of the Family Court's February 6, 2002 custody order is critical to the Court's assessment of Respondent's current legal custodial rights, and because Petitioners – by including the aforementioned transcript in the Joint Appendix – apparently agree that the transcripts of the state court proceedings are properly presented even when not in the record certified by the Ninth Circuit – Respondent has provided pertinent excerpts of the Family Court's prior statements (Appendix B). Additionally, since Petitioners have also included two Declarations from the child's mother (J.A. 81-87, 132-137), statements from other of her Family Court filings are also included (Appendix C).

[62] Respondent actually first challenged the constitutionality of the Pledge in the Eleventh Circuit. *Newdow v. U.S.*, 207 F.3d 662 (11th Cir. 2000). That case was dismissed for lack of standing after Respondent notified the court that he had moved from the Eleventh Circuit to California. It was initially filed on June 5, 1998, a year before the first Family Court action, and while the two parents were on excellent terms. Thus, the arguments that these proceedings are "a collateral attack on the pending state court child custody proceedings," *Br. for the United States* at 17, and that "the Rooker-Feldman Doctrine bars review of this claim," *Pet. Br.* at 21, are completely without merit. Respondent has made no attempt to challenge any state custody determinations in the federal courts.

The issue, therefore, is really one of mootness, rather than of standing, *Honig v. Doe*, 484 U.S. 305, 329-332 (1988) (Rehnquist, C.J., concurring), and "[t]o abandon the case at [this] advanced stage may prove more wasteful than frugal." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191-92 (2000). Nonetheless, per the grant of *certiorari*, the matter will be addressed as one of standing.

(1) The Family Court acknowledged its orders do not deprive Respondent of standing

On September 17, 2002 – while the "sole legal custody" order was in effect – the Family Court stated, "[I]f you want to maintain any action that says that, 'I think … that the government treats children, including my own child, unfairly by doing this,' I … don't know why you wouldn't have the right … to say that, vis-à-vis the joint custody issue." App. B4:4-8, *infra*. The same message was given a week later. App. B4:14-20, *infra*. Thus, Respondent has standing.

(2) Unless there exists a compelling state interest to the contrary, parents who are intimately involved in their children's lives have standing to sue when their children are being harmed

While this Court has never addressed the issue of standing with respect to a parent's legal custodial rights, it has noted that "the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Similarly, ""The private interest … of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). See also *Adoption of Kelsey S.*, 1 Cal. 4th 816, 838 (1992) ("The biological connection between father and child is unique and worthy of constitutional protection if the father grasps the opportunity to develop that

biological connection into a full and enduring relationship."). Here, the Family Court specifically noted, "There's definitely a fundamental right to parent, and in this particular case, both parties are given the fundamental right to parent. That is not being taken away from either one of them." App. B2:6-10, *infra*.[63] Thus, strict scrutiny applies, and a compelling state interest is required before government may abridge any of Respondent's rights of parenthood. Respondent and his child are exceedingly close and have a "full and enduring relationship." Regardless of the custodial arrangement, there is no valid state interest whatsoever – much less one that is compelling – in preventing loving parents from using the courts to protect themselves and their children. Thus, it would be a violation of Respondent's fundamental constitutional right of parenthood to deprive him of standing in this case. If any parent has standing to bring such a claim, Respondent here does as well.[64]

In fact, it can be argued that the injuries to parents are increased when custody is an issue. This is especially true in the case at bar, where Respondent is an Atheist and the mother has stated, "I am a Christian and am raising my daughter as one, which includes a belief that God exists." J.A. 84 (¶ 8). Petitioners' inculcation of Monotheism places "the power, prestige and financial support of government … behind [the mother's] particular religious belief." *Engel*, 370 U.S. at 431. Whatever the custody arrangement, Respondent has the right to compete with the mother's indoctrination of their child without the government weighing in.

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[63] The mother, too, has acknowledged that Respondent has "all of the rights and responsibilities of a parent." App. C1:34-35, *infra*. See also App. C2:10-14.

[64] The mother, obviously, also has a fundamental constitutional right of parenthood. However, having the public schools indoctrinate children with religious dogma is an activity prohibited to every parent. Thus, none of her parental rights are affected by recognizing Respondent's standing.

(3) Even as a "noncustodial" parent, Respondent would have standing in this litigation

California's statutory law envisions full rights of parenthood even outside an intact marriage. Family Code § 3020 (b), for instance, states, "The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have ... ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing ..." Similarly, F.C. § 3025 states, "[A]ccess to records and information pertaining to a minor child, including ... school records, shall not be denied to a parent because that parent is not the child's custodial parent." Under F.C. § 7602, "The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." Furthermore, the California "Legislature finds and declares ... [that] involving parents and guardians of pupils in the education process is fundamental to a healthy system of public education." Cal. Education Code § 51100(a), and § 51101 gives a lengthy detailing of the rights of parents to volunteer in class, have access to records, and "[p]articipat[e] ... in decisions relating to the education of their own child **or the total school program**." § 51101(b)(3)(G) (emphasis added). Thus, Respondent has a statutory right to be arguing this case, both with and without his child's involvement.

The vision of the enduring primacy of parent-child relationships is especially applicable in matters of religion. California specifically provides even "noncustodial" parents with the right to direct their children's religious upbringing while in their custody:

> [T]he courts have refused to restrain the noncustodial parent from exposing the minor child to his or her religious beliefs and practices, absent a clear, affirmative showing that these religious activities will be harmful to the child. The refusal to intervene in the absence of a showing of harm to the child reflects the protected nature of religious activities and expressions of belief, as well as the proscription against preferring one religion over another.

In re Marriage of Murga, 103 Cal. App. 3d 498, 504-505 (Cal. App. 4th Dist. 1980) (citations omitted). See also *In re Marriage of Mentry*, 142 Cal. App. 3d 260 (Cal. App. 1st Dist. 1983) (with extensive discussion of the state policy of encouraging continued contact with both parents, the rights of both parents to instruct their children in terms of religion absent a finding of harm, and the need for judicial restraint.); *In re Marriage of Weiss*, 42 Cal. App. 4th 106, 111 (Cal. App. 2d Dist. 1996) ("A parent will not be enjoined from involving a child with the parent's religious activities absent a clear affirmative showing of harm."). The Family Court in this case indicated precisely these sentiments during the "sole legal custody" order. App. B1:22-29; B3:20-32, *infra*.

Petitioners attempt to deny this clear confirmation of Respondent's rights by citing *Navin v. Park Ridge School Dist. 64*, 270 F.3d 1147 (7th Cir. 2001). Yet, by their own reading of that case, Respondent's standing – even as a noncustodial parent – is unassailable. His activities are in no way "incompatible with how the custodial parent [is] exercising her rights to direct the educational upbringing of the child." *Pet. Br.* at 15. In other words, even accepting for the moment that the mother has the sole right to choose the school their daughter attends,[65] Respondent has not

[65] The United States alleges that "[u]nder California law, moreover, the mother would be free to place the child in a pervasively religious private school in which daily prayer is an integral aspect of the educational environment." *Br. for United States* at 12-13. This is nonsensical. The California Court would undoubtedly deny a request to enroll the child in a Christian school were Respondent to object. More important, however, is that the claim misses the entire point of this litigation. It is perfectly

interfered with that right; the child is in that school. That the mother declared that she wants the child to "recite the Pledge of Allegiance as it currently stands," J.A. 85 (¶ 9), has no bearing whatsoever on the standing issue. Nothing in the Family Court's orders gives the mother any rights to direct how the school goes about fulfilling its educational mandate. As this Court has recognized, "local school boards have broad discretion in the management of school affairs." *Bd. of Educ. v. Pico*, 457 U.S. 853, 863 (1982). See also *Swanson by & Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998) ("[P]arents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject."). Thus, even assuming it is true that their child "wants to say the Pledge with the words under God," *Pet. Br.* at 20 – and that her alleged willingness is not due solely to the marked coercion that little children experience when their teachers lead them and their classmates in a daily routine that would subject them to embarrassment and potential ridicule were they to object – the fact that the mother "approves of their daughter's desire to do so," *id.*, is of no consequence at all.

Two additional harms that give Respondent standing deserve mention. The first is the harm recognized by the Ninth Circuit panel: his child will be taught "that her father's beliefs are those of an outsider, and necessarily inferior to what she is exposed to in the classroom." *App. to Cert.* 95. The second stems from the conflict his child may experience when forced to express a religious belief she knows her father denies. Respondent should not have to worry that

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consistent with the First Amendment's Religion Clauses for the mother, a private individual, to make religious choices for her daughter. The United States highlights the constitutional infirmity when it somehow equates that process – involving an individual's parental and free exercise rights – with government making religious choices for the child.

discussions of his religious choices with his child might result in her being torn by questions of loyalty to her dad as opposed to "fitting in" with her public school classmates.

(4) Respondent is a custodial parent who has never lost any significant legal custody rights

"In California, the term 'legal custody' is a wide-ranging concept encompassing a variety of parenting arrangements." *In re Crystal K.*, 226 Cal. App. 3d 655, 668 (Cal. App. 3d Dist. 1990). Respondent's custody has never been more than trivially diminished. The mother was obligated to first consult with Respondent in any disagreement, "[T]o this court [that] doesn't mean perfunctory consultation. It means true analysis." App. B2:13-23, *infra*. See also App. B3:1-11. The mother had "final decision making authority," *Pet. Br.* at 8, if an accord were not reached, but this "authority" was "final" only until a hearing could be held. Once there, the Family Court would decide the given issue based on the "best interests of the child" standard, J.A. 92, not favoring either individual. App. B2:25-33; B3:12-18. Thus, the maximum extent of less than full legal custody that Respondent might ever have suffered under the "sole legal custody" order was a few days.

That this was the judge's intent when he stated, "She makes the final decisions if the two of you disagree," J.A. 128, was demonstrated only one month after the "sole legal custody" order was implemented. Respondent wished to have his daughter watch him argue this case before the Ninth Circuit. The mother refused to "allow" that. **Over the mother's objection**, App. C1:22-27, *infra*, the same judge who implemented the "sole legal custody" order, granted Respondent's request. App. B1, *infra*. Thus, the mother has never been "the final decision maker." *Pet. Br.* at 4. The Family Court has been "the final decision maker," and –

except for the matter of days it takes to get a hearing – the two parents have always had equal legal custody rights.

Petitioners' arguments run especially hollow in view of their own behaviors. In addition to volunteering in class, Respondent has had communications with school officials, addressed school board meetings, and met with educators on a host of issues, including Policy AR 6115. See, *e.g.*, J.A. 56-57 (¶¶ 95-96). That has continued since Petitioners learned of the "sole legal custody" order. Had that order deprived Respondent of the rights now alleged, Petitioners would not have been authorized to allow the foregoing. (The Education Code "does not authorize a school … to permit participation by a parent … in the education of a child, if it conflicts with a valid … order for custody or visitation issued by a court of competent jurisdiction." Cal. Ed. Code § 51101(d). Additionally, Petitioners' policies encourage parental participation without regard to custody status.[66] No party can ever waive standing requirements. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). However, it is certainly odd to find Petitioners alleging that Respondent lacks the legal status to seek judicial protection of the parental rights they, themselves, acknowledge he possesses.

B. RESPONDENT'S VOLUNTEERING GIVES HIM STANDING ON HIS OWN (AS AN OBJECT OF THE ACTION) AND FURTHER PARENTAL STANDING

"[S]tanding depends considerably upon whether the plaintiff is himself an object of the action … at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury." *Lujan*, 504 U.S. at 561-562. Respondent has volunteered in his daughter's classes since 1999. Thus, he has witnessed his child being indoctrinated

[66] See, http://www.egusd.k12.ca.us/parents/welcome.htm.

with disputed religious dogma, and has, himself, been led by her teachers in the Pledge recitation. J.A. 49 (¶ 80).

These harms certainly exceed those of the plaintiffs in *Lynch* and *Allegheny County*, where the plaintiffs were turned into "outsiders, not a full members of the political community," *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring), when they merely viewed unwanted religious symbols.[67] That is far less significant than having to participate – even silently – in a group recital of disputed religious dogma, especially in front of one's child.

In *Lee v. Weisman*, a father was deemed to have standing as "next friend" to his daughter when he and she listened to a brief school graduation prayer.[68] Whatever harm Mr. Weisman suffered would have existed irrespective of his custody status or of Mrs. Weisman's wishes vis-à-vis the prayers she wanted her daughter to hear. Similarly, whatever harm Respondent suffers when forced to confront the classroom Pledge is the same no matter what his custodial status might be, or that the mother wants the child to "recite the Pledge of Allegiance as it currently stands," J.A. 85 (¶ 9).

Petitioners' contention that, "[a]s Respondent does not have the right to direct his daughter's education regarding the Pledge, he does not have an injury that can be redressed by this Court," *Pet. Br.* at 21, is incorrect on two grounds. First, Respondent does have that right, and it is virtually identical to the mother's right. Second, any parent intimately

[67] Being confronted with unwanted, government-sponsored religious dogma has been universally acknowledged as a basis for standing in the federal circuits. See, *e.g.*, *Glassroth v. Moore*, 335 F.3d 1282, 1291-1293 (11th Cir. 2003) (plaintiffs confronted with Ten Commandments monument walking through state Supreme Court building); *Freethought Soc'y v. Chester County*, 334 F.3d 247, 254-255 (3d Cir. 2003) (plaintiffs confronted religious plaque at county courthouse).

[68] Of note is that *Lee* was not mooted when it reached this Court because another graduation would occur four years after the first. *Lee*, 505 U.S. at 584. Here, Respondent has had far more frequent classroom exposures.

involved in his child's life suffers actual harms sufficient to give standing no matter what his legal custodial status. "The relevant showing for purposes of Article III standing ... [is] injury to the plaintiff," *Laidlaw*, 528 U.S. at 181, and the "legally protected interests" related to that injury may be completely independent of the legal relationships between the actors. See, *e.g.*, *Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 429 (D.C. Cir. 1998) (en banc) (Animal rights advocate has standing due to his concern over the loneliness of a Japanese Snow Macaque, despite no apparent familial relationship between the plaintiff and the monkey.) If a nature lover's "desire to ... observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing," *Lujan*, 504 U.S. at 562-563, and standing exists for an outdoorsman who believes he needs to change his canoeing plans, *Laidlaw*, 528 U.S. at 183, then a devoted father sharing physical custody who must alter his parenting[69] in response to a defendant's injurious-to-his-child policies clearly has standing, as well.

C. RESPONDENT HAS TAXPAYER STANDING

Respondent alleged taxpayer status in his *Complaint*, J.A. 62-65, and has provided an analysis showing that as much as $11,000 is spent by Petitioners (and $1.7 million by California) solely in reciting the words, "under God," in the Pledge. Memorandum of 4/21/00 at 13-14.[70] These are

[69] See *Complaint* ¶¶ 95, 101, and 130-132, plus 78, 79, 80 (J.A. 48-69).

[70] Petitioner pays both federal and state income taxes. He also pays local real estate taxes, both directly in Sacramento, and indirectly in Elk Grove. (Respondent has paid $2,000 per month in "child support" since prior to the onset of this litigation. App. at C2. Significant portions of the real estate taxes associated with the home his child stays in while with her mother come from these moneys. Inasmuch as "the parent, to whom such support is paid, is but a mere conduit for the disbursement of that support," *Williams v. Williams*, 8 Cal. App. 3d 636, 640 (Cal. App. 1st Dist. 1970), it is Respondent's dollars Petitioners receive.)

significant amounts of money. Even if trivial, however, "It is not the amount of public funds expended; as this case illustrates, it is the use to which public funds are put that is controlling." *Abington*, 374 at 230 (Douglas, J., concurring). See also *Board of Educ. v. Grumet*, 512 U.S. 687, 695 n.2 (1994) ; *Bowen v. Kendrick*, 487 U.S. 589 (1988) ("[F]ederal taxpayers have standing to raise Establishment Clause claims against exercises of congressional power under the taxing and spending power of Article I, 8, of the Constitution." *Id.* at 618; "*any* use of public funds to promote religious doctrines violates the Establishment Clause." *Id.* at 623 (O'Connor, J., concurring) (emphasis in original)); *Tilton v. Richardson*, 403 U.S. 672 (1971).

CONCLUSION

"The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy."[71] For the last fifty years, however, it has represented a particular religious view. Thus, rather than being "one Nation indivisible," America is now divided on the basis of religion by its very own "symbol." That this division is most prominent in the public schools is simply impermissible.

For this and the other foregoing reasons, Respondent respectfully requests that the Court affirm the decision of the Ninth Circuit Court of Appeals.

[71] *Texas v. Johnson*, 491 U.S. 397, 429 (1989) (Rehnquist, C.J., dissenting).

Respectfully submitted,

February 13, 2004

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APPENDIX A

Examples of Religion in the Colonial Constitutions[72]

Delaware (1776)

Article 22: "I …do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost."

Pennsylvania (1776)

Article 2, Section 10: "I do believe in one God, the creator and governor of the universe."

New Jersey (1776)

Article 19: "[A]ll persons, professing a belief in the faith of any Protestant sect. … shall be capable of being elected into any office."

Georgia (1777)

Article VI: "The representatives … shall be of the Protestant religion."

Massachusetts (1780)

Article 2: "It is … the duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING."

Article 3 : "[E]very denomination of christians …shall be equally under the protection of the law:"

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[72] State Constitutions: The Original Thirteen States.
The Constitutional Principle: Separation of Church and State
http://candst.tripod.com/toc.htm#constitutions.

Maryland (1776)

Section 33: "[A]ll persons, professing the Christian religion, are equally entitled to protection in their religious liberty."

South Carolina (1778)

Article 38: "[A]ll persons … who acknowledge that there is one God … shall be freely tolerated. The Christian Protestant religion … is … the established religion of this State."

New Hampshire (1784)

Article VI: "[E]very denomination of christians … shall be equally under the protection of the law:"

North Carolina (1776)

Article 32: "[N]o person, who shall deny the being of God or the truth of the Protestant religion, …shall be capable of holding any office."

APPENDIX B

Statements Made by Hon. James M. Mize Superior Court of Sacramento County State of California

(1) Records filed in the California Court of Appeal, 3rd Appellate District, Appeal No. C040840:

Wednesday, March 13, 2002

(Transcript on Appeal at 48:18-49:15)

"Now, with respect to the - - with respect to the visit at the court of appeal, I - - I - - I - - I think that that is very reasonable. I think that the - - it is an activity that - - that is a big moment in the father's life and - - and will be an interesting experience in the workings of - - of the way the - - the courts work and the way the government works.

…

"I think that with respect to making decisions regarding how she should be raised, that can be brought at certain stages and times, but with respect to exposing a child to the beliefs of the parent, I don't know that this court would get involved with that process and make those decisions, unless it were really clear that there were a clear and present danger to the child suffering serious - - from such a visit.

"I think that this will be a visit to a court and it'll be a visit with the grandparents, and she'll come home and I - - I'm going to permit that."

(2) Records filed in the California Court of Appeal, 3rd Appellate District, Appeal No. C042384:

(a) Wednesday, August 21, 2002

"There's definitely a fundamental right to parent, and in this particular case, both parties are given the fundamental right to parent. That is not being taken away from either one of them. They … just the time is divided between them." (Transcript on Appeal at 26:5-9.)

"[C]onsultation to this court doesn't mean perfunctory consultation. It means true analysis, and to the extent that a party does not cooperate in - - in - - in working together and to take the other person's advice, if it's appropriate, then that is a basis for this court to consider in - - in determining primary custody, because, as I indicated earlier in court on another matter, this court is interested in granting the primary custody - - one of the factors is the one who can best share - - that custody with the other, the one who can best allow the other person to input to the relationship."

…

"And - - and by the way, the default in the event of the impasse, again, for the clients' purposes - - counsel, you already know this - - simply means that - - that there would be a decision made, but that if it's bad enough, the other side then can come in and say, 'Your Honor, they - - she made a default judgment and it's wrong, and I want - - you to change it,' and the court - - and they have that opportunity." (Transcript on Appeal at 51:9-52:10.)

(b) Tuesday, September 17, 2002.

"Well, I think that the sole legal custody in this case, as I recall, as recommended by - - by Dr. Wagner and adopted by the court would - - is that the parties are to discuss and consult on all significant matters of - - of health, education and welfare of the child, and to basically assure that each party is, if you will, in the loop on these issues, and that in the event that there's an impasse, that the mother … acting alone would be able to exercise her discretion to make a decision.

"At that point, the - - the theory being that once that understanding is known, that then the father would have the right to again come into court and say, 'She's made this decision. I disagree with it. I think, your Honor, that it's not in the … child's best interest to … play volleyball instead of, you know, tetherball,' or something." (Transcript on Appeal at 170:24-171:12.)

"[S]he has two parents and both of them should have the right to in - - to inculcate their virtues and values that each of you have, and this court will de - - will defend that." (Transcript on Appeal at 194:2-5.)

"This - - the - - this child's going to be confused for quite a long time regarding this issue because the parties have divergent interests in that and that will resolve the way it is. That's a right of each of the parties, to - - to - - to inculcate their own positions with respect to that, as long as it's not to the disparagement of the other side. So I don't have any problems with that." (Transcript on Appeal at 205:5-11.)

Tuesday, September 17, 2002 (cont'd).

"[I]f you want to maintain any action that says that, 'I think … that the government treats children, including my own child, unfairly by doing this,' I … don't know why you wouldn't have the right … to say that, vis-à-vis the joint custody issue." (Transcript on Appeal at 208:3-9.)

(c) Wednesday, September 25, 2002.

"To the extent that by not naming her you have … an individual right as a parent to say that, "not only for all the children of the world but in - - mine in particular, I believe that this child - - my child is being harmed," but the child is ... not actually part of the suit, I don't know that there's any way that this court could preclude that." (Transcript on Appeal at 266:7-13.)

"You have total right of sole physical custody during those periods you have the child." (Transcript on Appeal at 276: 16-18.)

APPENDIX C

Statements Made by the Mother of Respondent's Child

(1) Records filed in the Superior Court of Sacramento County, State of California Case #99FL04312

(a) July 2, 1999, Declaration of Sandra Banning

"In spite of his travel, he has come to visit [child] often, and telephones her, and has formed a close relationship with her. …

"[A] lot of the time he provides adventures for [child]. Up until recently, when my relationship with the Defendant became more strained as will be explained below, the three of us would travel together."

(b) March 4, 2002 Declaration of Sandra Banning

"I am opposed to modifying the parenting plan established by the court order of February 6, 2002, so that Respondent can have custody of his daughter on the date that he is presenting his oral argument to the Ninth Circuit Court of Appeals that the words "under God" should be removed from the pledge of allegiance."

(c) July 19, 2003 Points and Authorities of Sandra Banning

"Regardless of the Court's decision in this case Newdow will continue to have all of the rights and responsibilities of a parent, and his parental relationship with his daughter will remain intact." (at 14-15)

(2) Records filed in the California Court of Appeal, 3rd Appellate District, Consolidated Appeal No. C040840 & C042384

August 26, 2003 Respondent's Brief for Sandra Banning

"Newdow has not lost all rights of parentage and nothing in the record suggests that, because he must pay some of Banning's attorney fees, he is unable to have a meaningful parent-child-relationship with [child] or develop a strong and lasting bond with her." at 23